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CENTRAL DISTRICT OF CALIFORNIA
BY [INITIALS] DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

EARNEST BRAY, JR., Petitioner, v. EDDIE YLST, Warden, Respondent.	No. CV 98-4672-R(BQR) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to United States District Judge Manuel L. Real pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

Petitioner Earnest Bray, Jr. (hereinafter referred to as "Petitioner") filed a "Petition for Writ of Habeas Corpus by Person in State Custody" on June 9, 1998. Respondents filed an Answer and Return on July 1, 1998 and July 29, 1998, respectively. Petitioner filed a Traverse on

August 18, 1998.

II.

BACKGROUND

On March 17, 1995, petitioner was convicted by a jury of petty theft with a prior conviction in violation of California Penal Code Section 666. The jury also found that Petitioner had four prior robbery convictions, which qualified as "strikes" under the Three Strikes Law. Pursuant to Penal Code Section 667.5(b) the jury additionally found that petitioner had previously been convicted of two robberies and had served prison terms for those robberies. Under the Three Strikes Law, petitioner was sentenced to state prison for a term of 25 years to life.

Petitioner appealed his conviction which was affirmed by the California Court of Appeal on April 26, 1996. Petitioner filed a petition for review in the California Supreme Court which was denied on July 10, 1996.

Petitioner filed a petition for writ of habeas corpus in the Los Angeles Superior Court on May 20, 1997. The petition was denied on June 25, 1997.

III.

STATEMENT OF FACTS

On March 28, 1994, Petitioner was caught attempting to leave the Wherehouse video store in the Long Beach Mall without paying for three video cassettes. [Reporters Transcript (hereinafter "R.T.") 26-30.] Petitioner was detained by store clerks, turned over to mall security, and eventually arrested by officers of the Long Beach Police Department. [R.T. 34-36, 47-50] Petitioner waived his constitutional rights and admitted the thefts to police officers. [R.T. 47-50]

IV.

PETITIONERS' CONTENTIONS

Petitioner contends the following inter alia:

1. The imposition of a twenty-five years to life sentence pursuant to the Three Strikes Law constitutes cruel and/or unusual punishment under the state and federal constitutions;

2. The provisions of the Three Strikes Law do not apply to petty theft because petty theft is not a felony offense; and

3. CALJIC No. 2.90, as revised in 1994, failed to specify the degree of certainty required to find someone guilty beyond a reasonable doubt.

V.

DISCUSSION

For all of the following reasons, the petition should be denied and dismissed.

A. Applicability of AEDPA

The petition herein was filed after the President signed into law the Anti-terrorism and Effective Death Penalty Act of 1996 (the "Act"). Accordingly, to the extent petitioner has stated otherwise cognizable federal claims, the Court concurs with respondents that its consideration of this claim is governed by the provisions of the Act. Under 28 U.S.C. § 2254(d), as amended by the Act:

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -- (1) resulted in a decision

> that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings."

Thus, under Section 2254(d), the federal court must first determine whether there is a qualifying state court decision. If there is a qualifying state court decision, the federal court must determine whether (a) the decision was contrary to clearly established federal law as determined by the United States Supreme court, or (b) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

B. Petitioner Has Failed To Raise A Federal Question With Respect To Part of Ground One And Ground Two

Petitioner alleges in ground one that his state prison sentence violates prohibitions against cruel and/or unusual punishment under the state constitution. This portion of petitioner's argument does not raise a federal constitutional issue and therefore must be dismissed.

In ground two of the petition, petitioner argues that a petty theft with a prior is not a third strike felony offense under California Three Strikes Law.

The California Court of Appeal held:

> "We reject Bray's contention that petty theft with a prior is not a felony for purposes of the three strikes law. Sections 17, 666; People v. Martin, (1995) 32 Cal. App. 4th 656, 660 [a prior conviction is the basis to elevate a petty theft to a felony); People v. Bouzas (1991) 53 Cal. 4th 467, 471 [a court is given

> discretion under sections 666 to treat petty theft with a prior as a felony]; see also, People v. Hamilton, (1995) 40 Cal. App. 4th 1615; People v. Dent, (1995) 38 Cal. App. 4th 1726; People v. Loomis, (1995) 42 Cal. App. 4th 404, review granted November 16, 1995 (SO49374).) People v. Bouzas, supra, 53 Cal. 3d 467, upon which Bray relies, do not directly consider the issue raised and thus does not support Bray's position.

The statutory interpretation of California's Three Strikes Law is a state issue. See, Snook v. Wood, 89 F.3d 605 (9th Cir. 1996); Peltier v. Wright, 15 F.3d 860, 861-62 (9th Cir. 1994) (federal habeas unavailable for error in interpretation of state law). Therefore, ground two is not a federal question and must be dismissed.

C. The Trial Court's Instruction To The Jury Of CALJIC 2.90 Was Not Improper

Petitioner contends that the trial court violated his constitutional rights in sentencing petitioner to twenty-five years to life in state prison and in instructing the jury with revised CALJIC No. 2.90.

With respect to this claim, the California Court of Appeal's decision on direct appeal constitutes the qualifying state court decision, for purposes of Section 2254(d). Under Ylst v. Nunnemaker, 501 U.S. 797, 111 S.Ct. 2590, 115 L. Ed. 2d 706 (1991), it may be presumed that the California Supreme Court by its silent denial of the petition for review, did not intend to change the appellate court's reasoned decision rejecting the claim. See, 501 U.S. at 803-04.

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 68 (1991); see 28 U.S.C. § 2254(a). Habeas relief is not available for an alleged error in the interpretation or application of state law. Estelle v. McGuire, 502

U.S. at 68; Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991); see also Dugger v. Adams, 489 U.S. 401, 409 (1989) ("the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution").

To the extent petitioner claims the jury instruction was incorrect under state law, his claim is not cognizable on federal habeas review. Estelle v. McGuire, 502 U.S. at 71-72. To merit relief, petitioner must show the instructional error so infected the entire trial that the resulting conviction violated due process. Id.; Henderson v. Kibbe, 431 U.S. 145, 154 (1977); Cupp v. Naughten, 414 U.S. 141, 147 (1973). The allegedly erroneous instruction must be considered in the context of the trial record and the instructions as a whole. Estelle v. McGuire, 502 U.S. 62, 72 (1991); Henderson v. Kibbe, 431 U.S. at 156; Cupp v. Naughten, 414 U.S. at 146-47.

In Victor v. Nebraska, 511 U.S. 1239, 114 S. Ct. 1239, 1243-49 (1994)[2/] the Supreme Court examined the constitutionality of California's and Nebraska's reasonable doubt instructions. The Supreme Court unanimously found California's reasonable doubt instruction constitutional.

"The beyond a reasonable doubt standard is a requirement of due process but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." Victor v. Nebraska, 114 S. Ct. at 1243. The Constitution does not require "that any particular form of words be used" for the reasonable doubt jury instruction so long as the court instructs the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt. Id., (citing Jackson v. Virginia, 443 U.S. 1307, 1320 n.14 (1979).) Rather, "taken as a whole, the instruction must correctly convey the concept of reasonable doubt to the jury". Id. (quoting Holland v. United States, 248 U.S. 121, 140 (1954)). The proper inquiry is not whether the

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2. The Supreme Court decided Sandoval v. California together with Victor v. Nebraska.

instruction could have been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it. Id.

Use of the phrase "moral certainty" does not automatically render the instruction unconstitutional. Victor v. Nebraska at 1246, 1250. A reference to substantial doubt alone is not sufficient to render a reasonable doubt instruction unconstitutional. Id. at 1250. Neither does the use of the phrase "strong probabilities" render the instruction unlawful. Id. at 1251.

This Court has duly reviewed the California Court of Appeal's rationale for rejecting petitioner's claim.

> "Finally, we reject Bray's contention that the current version of CALJIC No. 2.90 fails to specify the degree of certainty required for proof beyond a reasonable doubt. This instruction is identical to the language, 'suggested' in People v. Freeman, (1994) 8 Cal 4th 450, 504, fn.9, and is therefore, binding on us (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 455). While we agree with Bray that the issue should be revisited to determine whether the United States Supreme Court decision in Victor v. Nebraska, (1994) 511 U.S. ____ [127 L. Ed. 2d 583, 114 S. Ct. 1239], which led to our Supreme Court' s decision in Freeman, really meant to equate `abiding conviction', without further definition, with proof beyond a reasonable doubt, that is an issue for our Supreme Court, not us."

Based upon this Court's review of the record, this Court concurs with the California Court of Appeal. This Court, therefore, finds and concludes that the Court of Appeal's decision rejecting this claim neither was contrary to nor involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court.

D. Petitioner's Sentence Does Not Violate The Prohibition Against Cruel And/Or Unusual Punishment

Petitioner contends his sentence violates the prohibition against cruel and/or unusual punishment under the federal Constitution.

With respect to this claim, the California Court of Appeal's decision on direct appeal constitutes the qualifying state court decision, for purposes of Section 2254(d). Under Ylst v. Nunnemaker, 501 U.S. 797, 111 S.Ct. 2590, 115 L. Ed. 2d 706 (1991), it may be presumed that the California Supreme Court by its silent denial of the petition for review, did not intend to change the appellate court's reasoned decision rejecting the claim. See, 501 U.S. at 803-04.

The Court of Appeal held as follows:

> "We *reject* Bray's contention that his sentence constitutes cruel and unusual punishment. A penalty offends the proscription against cruel and unusual punishment only when it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notion of human dignity. (In re Lynch, (1972) 8 Cal. 3d 410, 424). Contrary to Bray's suggestion, the three-pronged approach outlined in Lynch does not require us to give any weight at all to the relatively minor nature of his current offense. It permits us to focus on the offender rather than the offense, and the danger he poses to society. (Id. at pg. 425-427.) Here, Bray's record provides the justification for his sentence.
>
> In 1979, when Bray was 19, he committed his first two robberies, during which a cohort used a firearm and fired shots at one of the victims. Four months later, Bray committed a third armed robbery. He

was sentenced to concurrent terms for these three offenses and remained in prison until November 1981, at which time he was released on work furlough. That term of incarceration did not put an end to Bray's life of crime and in July 1985, he was convicted of possession of a dangerous weapon. He was placed on probation with county jail time, to no avail. About the time his probation ended, Bray committed yet another robbery (his fourth). He was again sentenced to state prison, paroled in June 1989, and then discharged in July 1990. Within weeks, he was charged with battery (although those charges were later dismissed). In September 1991, he was convicted of a drug charge and was sentenced to another 90 days in jail. His current offense was committed on March 1994 . . . but that wasn't the end. While out on bail, he committed another petty theft.

"Quite clearly, Bray' s sentence is a result of his recidivist behavior and it is that behavior that justifies the twenty-five years to life term. Given Bray's inability to respond to shorter sentences, it is clear that this lengthy sentence is not cruel or unusual but simply the only way to protect society from his continuing offenses. (People v. Cartwright, (1995) 39 Cal. App. 4th 1123, 1136-37; People v. Ingham, (1995) 40 Cal. App. 4th 1397, 1415; People v. Gore, (1995) 42 Cal. App. 4th 1, 14, review granted November 22, 1995 (S058866); People v. Drew, (1995) 40 Cal. App. 4th 811, 819 (review granted March 14, 1996) (S050984); People v. Kinsey, (1995) 40 Cal. App. 4th 1621, 1631).

"For the reasons stated in People v. Markson, (1995) 41 Cal. App 4th 387, 392, review granted March 21,

> 1996 (SO5106) People v. Spears, (1995) 40 Cal. App. 4th 1683, 1688-1690, People v. Kinney, supra, 40 Cal. App. 4th at pg. 1629, and People v. Cartwright, supra, 39 Cal. App. 4th at pgs. 1133-1134, we reject Bray's contention that the three strikes law was improperly enacted as an urgency measure." (California Court of Appeal Opinion pg. 3-4).

Based upon this Court's review of the record, this Court concurs with the California Court of Appeal. This Court, therefore finds and concludes that the Court of Appeal's decision rejecting this claim neither was contrary to nor involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court.

VI.

RECOMMENDATION

For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that the Court issue an Order: 1. Approving and adopting this Report and Recommendation; and 2. directing that Judgment be entered denying and dismissing the petition.

DATED: 3-30-99

[SIGNATURE]
BRIAN QUINN ROBBINS
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as

provided in the Local Rules Governing the Duties of the Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.